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THE LITTLE PRINCE AND THE BUSINESSMAN: CONFLICTS AND TENSIONS IN PUBLIC INTERNATIONAL AIR LAW

JESWALD W. SALACUSE*

"How is it possible for one to own the stars?"

"To whom do they belong?" the businessman retorted, peevishly.

"I don't know. To nobody."

"Then they belong to me, because I was the first person to think of it."¹

I. INTRODUCTION

INTERNATIONAL air law has been fraught with tensions and conflicts since the very beginning of aviation. While individual issues such as those relating to air traffic rights and user charges have invariably provoked a broad spectrum of diverse opinion, the persistence of a continuing state of tension would appear to arise basically from two fundamentally opposing attitudes about the way in which international issues ought to be resolved: through the unilateral exercise of national power or the application of internationally accepted rules.² A few years ago, H. A. Wassenbergh, a noted scholar and airline executive, pointed to the existence of this basic dichotomy in international air law: "There are mainly two ways to regulate international civil aviation: a. agree

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¹ A. DE SAINT EXUPERY, *THE LITTLE PRINCE* 46 (K. Woods trans. 1943).

² Professor John Jackson has termed these two approaches "power oriented" and "rule oriented diplomacy." Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J. WORLD TRADE L. 93, 98-99 (1978).

on common general principles and apply these principles to the operation of international air services; or b. for individual states to try to enlarge their sphere of influence in international civil aviation by any available means."³

In less prosaic, more poetic terms, Antoine de Saint Exupery, the renowned pilot, writer, and poet of flight, also evoked this basic tension between national action and international norms in *The Little Prince*, a charming tale which continues to captivate adults and children alike. The Little Prince, it will be recalled, left his asteroid to explore other planets where, like Voltaire's *Candide*, he discovered with wonderment much about the human species. On one planet, he met a businessman who purported to own the stars because no one else before him had ever thought of owning them.⁴ Incredulous at this notion, the Little Prince responded that to own something one must be of some use to it and that the businessman was of no use whatsoever to the stars.⁵

Like the Little Prince and the businessman, the members of the international community, in seeking to regulate international aviation, have struggled for years over the diverse implications of a fundamental question: Who owns the sky? On any given issue some states have proceeded from a position that assumes the triumph of unilateral action and national ownership, while others have espoused the supremacy of international law and control. Few states, however, have held to either position consistently throughout the history of aviation and the various conflicts which have characterized its development. Yesterday's Little Prince has a way of becoming today's businessman. At all times, of course, the justifications presented for any particular approach to the regulation of international aviation have been as elaborate as those advanced in the debate over the ownership of the stars. The

³ H. Wassenbergh, *PUBLIC INTERNATIONAL AIR TRANSPORTATION LAW IN A NEW ERA* 12 (1976) [hereinafter cited as Wassenbergh].

⁴ A. de Saint Exupery, *THE LITTLE PRINCE* 43-47 (K. Woods trans. 1943). The businessman offered the following justification for his position:

When you find a diamond that belongs to nobody, it is yours.
When you discover an island that belongs to nobody, it is yours.
When you get an idea before any one else, you take out a patent on it; it is yours. So with me: I own the stars, because nobody else before me ever thought of owning them.

Id. at 46.

⁵ *Id.* at 46-47.

purpose of this paper is to examine the nature of the tensions and conflicts, both past and present, in public international air law resulting from these two opposing approaches and then to explore how the law may eventually reconcile the competing demands of the Little Prince and the businessman.

II. CONFLICTS PAST

The historical development of international air law has thus far passed through three distinct phases: a) the period before 1919; b) the period from the 1919 Paris Convention on Aerial Navigation to the 1944 Chicago Convention on International Civil Aviation; and c) the period since 1944. While each period has witnessed the further elaboration of an international legal framework for civil aviation, each has also been characterized by a prevailing state of tension.

A. *The Period Before 1919*

The advent of aviation, like the emergence of many other major scientific and technological innovations in history, occurred in the absence of law to regulate its use. While individual states soon began to enact domestic legislation to protect the lives and property of their citizens,⁶ it was clear almost from the start that aviation's potential for international transportation presented undoubted legal problems of an international character. International law at the time, however, offered little in the way of solutions. Treaties on any aspect of international air transportation were nonexistent, and the practice of states with regard to balloons and aircraft had not yet solidified to the point where one could say with certainty that customary rules of international law existed.

Legal scholars jumped into this void in an effort to contribute to the elaboration of appropriate legal principles to foster the development of international aviation. Their primary and fundamental concern was to determine the extent and nature of the rights of states in the airspace above their territories.⁷ They grap-

⁶ See P. SAND, G. PRATT & J. LYON, *AN HISTORICAL SURVEY OF THE LAW OF FLIGHT* 4-7 (1961) [hereinafter cited as SAND, PRATT & LYON].

⁷ W. WAGNER, *INTERNATIONAL AIR TRANSPORTATION* 2 (1970) [hereinafter cited as WAGNER].

pled with numerous questions: Could the aircraft from one state freely enter the airspace of another? If not, what restrictions might be imposed? If they might freely enter such airspace, might they also freely land on the subjacent territory? If not, did a special exception exist for aircraft in distress? In essence, the basic issue was one of sovereignty in the international legal sense—"ownership" in the lexicon of the Little Prince.⁸

European scholars dominated this discussion, and those from France, the site of early significant aeronautical achievements, were particularly active. Reasoning by analogy from existing international legal principles governing territory and the sea, they eventually formulated several distinct positions on the question of state sovereignty over airspace. On the one hand, certain scholars, influenced by the rule of freedom of the high seas, advocated the absolute freedom of air navigation, arguing that all types of aircraft should be free to fly at any altitude without any right of control in the subjacent states.⁹ At the opposite end of the spectrum, other authors, concerned with the security interests of subjacent states and influenced by traditional legal principles governing state territory, took the position that a state had absolute sovereignty over the airspace above its territory without limit as to altitude.¹⁰ Under this theory, freedom of air navigation would exist only over the high seas and no man's land.¹¹

Between these two extreme positions various intermediate schools of thought existed. Some, influenced by the distinctions in maritime law between the territorial sea and the high seas, advocated that freedom of the air exist above a certain altitude, but that the space below such altitude be considered a zone of "territorial air" subject to the absolute sovereignty of the subjacent state.¹² Others argued that to protect the vital interests of the state while

⁸ "Territorial sovereignty bears an obvious resemblance to ownership in private law, less marked, however, today than it was in the day of the patrimonial state, when a kingdom and everything in it was regarded as being to the king very much what a landed estate was to its owner." J. BRIERLY, *LAW OF NATIONS* 162 (6th ed. 1963).

⁹ See, e.g., Nye, *Droit et Aerostats*, 4 *REVUE DE DROIT INT'L* 501 (1902). See WAGNER, *supra* note 7, at 13-14.

¹⁰ See, e.g., H. HAZELTINE, *THE LAW OF THE AIR* 1-53 (1971). See WAGNER, *supra* note 7, at 14-16.

¹¹ WAGNER, *supra* note 7, at 16.

¹² *Id.* at 21-23.

at the same time permitting development of aviation, airspace over state territory at any altitude should be submitted to its *limited* sovereignty.¹³ The nature of the limitation was basically functional.¹⁴ Thus, while a state might prevent military aircraft from flying over its territory, it ought not to obstruct the passage of innocent, civil aircraft.¹⁵

The debate among the writers proceeded actively and generated a significant amount of publication during the first two decades of the twentieth century; however, the writings of scholars do not create rules of international law. The primary sources of international law are treaties and international custom as evidenced by practice.¹⁶ With regard to the latter, national legislation, as well as diplomatic actions in response to various aerial incidents, strongly suggested that the states considered their sovereignty to extend to the airspace over their territories. With the advent of World War I and the development of military aviation, they definitively rejected absolute freedom of the air and enforced the principle of sovereignty to the point where it appeared to be a customary rule of international law.¹⁷

Beginning in 1898, a few states began to conclude bilateral agreements to regulate selected aspects of international aviation; however, a multilateral treaty establishing a general legal framework for international civil aviation would elude the international

¹³ *Id.* at 16-31.

¹⁴ SAND, PRATT & LYON, *supra* note 6, at 8. See also WAGNER, *supra* note 7, at 25-28.

¹⁵ WAGNER, *supra* note 7, at 28. This was clearly analogous to right of innocent passage granted to ships by international law.

¹⁶ A more particularized listing of the sources of international law may be found in Article 38 of the Statute of the International Court of Justice, [1970] U.N.Y.B. 1017, which provides as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

¹⁷ WAGNER, *supra* note 7, at 36; SAND, PRATT & LYON, *supra* note 6, at 12.

community until after World War I. In May, 1910, the European states attempted a step in this direction with an eighteen-nation international conference¹⁸ in Paris to draft such a treaty. The conference failed, however, because the participants were unable to reach agreement on the fundamental question of state sovereignty over airspace, the issue that had attracted scholars' attention from the very start.¹⁹ While none of the delegates advocated the absolute freedom of airspace and all recognized that the interests of subjacent states required at least some limitations on the right of foreign aircraft to fly over state territory, they remained sharply divided over the extent to which sovereignty could be exercised.²⁰ On the one hand, Great Britain took the position that each state had *absolute sovereignty* over the airspace above its land and territorial waters and that it was not required to treat national and foreign aircraft on an equal basis.²¹ France, on the other hand, argued for the recognition of the limited freedom of the air, a position which would permit a state to enact certain regulations necessary to protect its interests but deny it the right to prohibit civil aviation altogether.²² In addition, the restrictions that a state did enact were to be applied without discrimination as to the nationality of the aircraft.²³ Once more the debate between the Little Prince and the businessman had been joined and once more the two protagonists failed to reach agreement on who owned the air.

World War I did much to advance aviation technology as well as to demonstrate its military potential. As a result, states came to recognize the need to adopt uniform principles to foster the development of international air transportation, but the threat

¹⁸ See generally Pepin, *La Conference de Paris de 1910*, 3 ANNALS AIR & SPACE L. 185 (1978). See also Cooper, *The International Air Navigation Conference, Paris 1910*, 19 J. AIR L. & COM. 127 (1952).

¹⁹ SAND, PRATT & LYON, *supra* note 6, at 10.

²⁰ *Id.*

²¹ Cooper, *The International Air Navigation Conference, Paris 1910*, 19 J. AIR L. & COM. 127, 134 (1952).

²² *Id.* at 131.

²³ *Id.* at 140. Despite the fact that the conference adjourned less than two months after it was convened without arriving at an agreement on the text of an appropriate treaty, it did complete a lengthy draft convention whose principles would later influence the Paris Convention of 1919 and the Chicago Convention of 1944. SAND, PRATT & LYON, *supra* note 6, at 10.

which aviation posed to their security also led them to affirm their sovereignty over the airspace above their territories and territorial waters. In order to establish an appropriate international legal framework for post-war civil aviation, France convened an international conference in Paris in March, 1919.²⁴ Thirty-eight states attended, and this time the delegates, relying to a significant extent on the earlier work of scholars and the deliberations of the 1910 conference, were successful in reaching an agreement on the text of a treaty: the Convention Relating to the Regulation of Aerial Navigation, which was opened for signature on October 13, 1919.²⁵

B. *From the 1919 Paris Convention to the 1944 Chicago Convention*

The Paris Convention of 1919, the first multilateral treaty concerning air law, settled the question which legal scholars had been debating for more than twenty years: a state did indeed have sovereignty over the air space above its territory. The first sentence of article 1 stated: "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory."²⁶ The operative word was "recognize," not "grant" or "agree." That choice was a clear indication that

²⁴ WAGNER, *supra* note 7, at 39.

²⁵ Convention Relating to the Regulation of Aerial Navigation, *signed*, Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter cited as the Paris Convention]. Thirty-two states ultimately ratified the Convention. WAGNER, *supra* note 7, at 51. Although the United States attended the Paris Conference and signed the text, it never ratified the treaty and thus was never bound by it. Jones, *The Equation of Aviation Policy*, 27 J. AIR L. & COM. 221, 225 (1960).

²⁶ Paris Convention, *supra* note 25, at art. 1. The second sentence of article 1 proceeded to define "the territory of a state" as "including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto." Paris Convention, *supra* note 25, at art. 1. The United States would incorporate the principle and language of article 1 of the 1919 Paris Convention in section 6 of the Air Commerce Act of 1926, Pub. L. No. 69-254, § 6, 44 Stat. 572 (1926), the current version of which appears at 49 U.S.C. § 1508 (1976):

The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace above the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.

49 U.S.C. § 1508 (1976).

sovereignty over airspace was a customary principle of international law which existed apart from the Convention and did not come into existence because of it. Moreover, "every Power," not just the signatories to the Convention, was recognized as having complete and exclusive sovereignty over the airspace above its territory. The Convention itself did not define "sovereignty" or delineate fully its implications for purposes of regulating international air transportation. For example, it did not specify to what height in the atmosphere a state had sovereignty.

Sovereignty, as ordinarily understood in international law, is the right of a state in regard to a certain area of the world to exercise jurisdiction over persons and things to the exclusion of the jurisdiction of other states.²⁷ The exercise of state jurisdiction is, however, subject to the limitations imposed by international law, a restriction whose nature and content are not universally agreed upon by either states or scholars. Nonetheless, the recognition of exclusive sovereignty in the airspace above state territory clearly gave the subjacent state the right to enact regulations on air traffic, to exercise police powers, and even to prohibit foreign aircraft altogether from entering or passing through its airspace.²⁸ The implications of this principle were clear: if international aviation was to develop at all, it would have to proceed on the basis of agreements among states, rather than on any general principle of international law which guaranteed freedom of the air. Moreover, individual states, by withholding agreement, had significant power to obstruct international air transportation.

It would thus appear at first glance that the 1919 Paris Convention represented a victory of the businessman over the Little Prince; and, indeed, various legal scholars, in tones faintly reminiscent of Saint Exupery's little hero, strongly criticized the Convention for having chosen sovereignty instead of freedom of the air.²⁹ On the other hand, the adoption of the principle of sovereignty may have placed the international community irrevocably on the path of seeking an international legal framework for aviation which would be acceptable to both large and small states alike.

²⁷ 1 C. SHAWCROSS & M. BEAUMONT, *AIR LAW* 15 (4th ed. 1977) [hereinafter cited as 1 SHAWCROSS & BEAUMONT].

²⁸ WAGNER, *supra* note 7, at 41.

²⁹ See WAGNER, *supra* note 7, at 62-89.

A regime based on freedom of the skies might have facilitated unfettered unilateral action and a "power oriented approach"³⁰ to international aviation, an approach that in the end would have benefited the large states and those with substantial aviation capacity at the expense of the small.

In order to establish the needed consensual basis for international air transportation, article 2 of the Paris Convention provided: "Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting states, provided that the conditions laid down in the present Convention are observed."³¹ The exercise of this freedom, analogous to the right of innocent passage granted to foreign ships in the territorial waters of a state,³² could be subjected to restrictions and limitations imposed by the subjacent state, provided it did so without distinction as to nationality. Thus, the overflown state could prescribe the route which such aircraft might take,³³ prohibit flight over certain areas for military or public safety purposes,³⁴ and require such aircraft to land on its territory for "reasons of general security."³⁵

At best, the Paris Convention set down an incomplete basis for international aviation in the post-war era. While it granted to the contracting parties the freedom of transit—ultimately to be known as the "first freedom"—it stated nothing about the "second freedom," the freedom to land on foreign territory.³⁶ Some authors therefore concluded that the second freedom was not granted, but others argued that it must be implied in the freedom of transit.³⁷ An even greater defect of the Convention, however, was its failure to come to grips with the problem of commercial aviation.

³⁰ See Jackson, *supra* note 2, at 98-99.

³¹ The first sentence of article 15 of the Paris Convention appeared to repeat the substance of article 2, for it provided: "Every aircraft of a contracting State has the right to cross the airspace of another State without landing." Paris Convention, *supra* note 25, at art. 15.

³² Convention on the Territorial Sea and the Contiguous Zone, *done*, Apr. 29, 1958, art. 14, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

³³ Paris Convention, *supra* note 25, at art. 15.

³⁴ *Id.* at art. 3.

³⁵ *Id.* at art. 15.

³⁶ WAGNER, *supra* note 7, at 47.

³⁷ See *id.* at 47-48.

Before 1919, the principal tension in international air law was essentially political in character, for beneath the debate over sovereignty and freedom of the air lay a concern for national security. After 1919, the tensions would become increasingly economic in nature as the states came to realize that international aviation could become an important source of revenue in which their national airlines might share. The 1919 Convention hardly mentioned commercial aviation at all and did not recognize it as a distinct branch of international aviation in general. Although articles 2 and 15 granted the freedom of innocent passage,³⁸ the last paragraph of article 15 provided: "The establishment of international airways shall be subject to the consent of the states flown over."³⁹

It was not clear whether this provision was to be read as a limitation on the freedom of transit granted in articles 2 and 15 so as to require commercial airline flights to obtain the express agreement of the overflown state. Some argued that the final sentence of article 15 merely referred to the setting up of ground facilities in support of airline operations,⁴⁰ or that the word "airline" referred to designated "routes" rather than "services."⁴¹ The matter caused considerable controversy and was only resolved in 1929 when the Convention was amended to provide that "[e]very contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."⁴² Thus, having come to realize the economic potential of commercial aviation and seeking to protect their own national airlines, the states excluded regulation of commercial aviation from the provisions of the Paris Convention and thereby made it subject to other arrangements, notably bilateral agreements.

The Convention did contribute significantly to the advancement

³⁸ Paris Convention, *supra* note 25, at arts. 2, 15.

³⁹ *Id.* at art. 15.

⁴⁰ WAGNER, *supra* note 7, at 49.

⁴¹ Goedhuis, *Civil Aviation After the War*, 36 AM. J. INT'L L. 596, 601 (1942).

⁴² Protocol Concerning Amendments to Articles 3, 5, 7, 15, 34, 37, 41, 42 and to the Final Provisions of the Convention Relating to the Regulation of Aerial Navigation, signed, June 15, 1929, art. 15, 138 L.N.T.S. 418, 421.

of international air law in other respects. It set down basic principles on the nationality and registration of aircraft,⁴³ required certificates of air worthiness of aircraft engaged in international navigation,⁴⁴ required aircraft personnel to hold certificates of competency,⁴⁵ and specified rules on a variety of technical matters, including customs⁴⁶ and takeoffs and landings.⁴⁷ In addition, it created the International Commission for Air Navigation (ICAN),⁴⁸ a permanent organization under the League of Nations, composed of representatives of the contracting states. The duties of the commission were to collect and communicate relevant data to the member states on such matters as international air navigation and meteorology; to propose necessary amendments of the Convention; to implement the technical rules and to amend them if necessary; and to give advice on any matters requested by the member states.⁴⁹ ICAN played an active role in the development of international aviation between the two world wars,⁵⁰ and its functions would be assumed by the International Civil Aviation Organization in 1947.⁵¹

Prior to 1919, scholars and governments had concerned themselves primarily with issues of public international law. With the growth of aviation after World War I, they turned their attention to matters of private international law, particularly liability for damage caused by aircraft, property rights in aircraft, collisions, insurance, and bills of lading. Not only was there a need for appropriate rules on these subjects, but it was also important that the law be as uniform as possible throughout the world. Toward this end, France convened the First International Conference on

⁴³ Paris Convention, *supra* note 25, at arts. 5-8.

⁴⁴ *Id.* at arts. 11, 13.

⁴⁵ *Id.* at art. 14.

⁴⁶ *Id.* at Annex H.

⁴⁷ *Id.* at arts. 19-25.

⁴⁸ *Id.* at art. 34. This organization is also known as CINA, an acronym derived from the French-language form of its name: Commission Internationale de Navigation Aérienne.

⁴⁹ *Id.*

⁵⁰ SAND, PRATT & LYON, *supra* note 6, at 14.

⁵¹ See Convention on International Civil Aviation, *opened for signature*, Dec. 7, 1944, *entered into force*, Apr. 4, 1947, art. 43, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter cited as Chicago Convention].

Private Air Law in Paris in 1925 with the basic purpose of drafting a treaty on the liability of carriers in international transportation and of determining whether the states should seek to unify private international air law.⁵² One of the concrete results of the conference was the creation of the Comité International d'Experts Juridiques Aériens (CITEJA),⁵³ an advisory committee of legal experts which was to undertake the studies necessary to achieve the goal of unified law on various aspects of international aviation. In the following years, CITEJA was instrumental in preparing various treaties which were then submitted to subsequent International Conferences on Private Air Law.⁵⁴ They included the Warsaw Convention of 1929 on the liability of air carriers for injury to persons, baggage, and goods transported;⁵⁵ the Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft;⁵⁶ and the Rome Convention on the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface.⁵⁷

The period between the world wars had witnessed a considerable advance in the development of international air law. The nations of the world had reached agreement on certain principles of public and private international air law, particularly in the technical domain, and had created two international organizations to continue the process of international legal development.⁵⁸ On the other hand, a comprehensive multilateral legal framework—particularly with respect to commercial exploitation of international aviation—had failed to materialize.

⁵² SAND, PRATT & LYON, *supra* note 6, at 16.

⁵³ See *Ide*, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. & COM. 27, 30-32 (1932).

⁵⁴ *Id.* at 32-40.

⁵⁵ Convention for the Unification of Certain Rules Regarding International Transport, *signed*, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

⁵⁶ *Signed*, May 29, 1933, 192 L.N.T.S. 289.

⁵⁷ 2 C. SHAWCROSS & M. BEAUMONT, AIR LAW 73 (4th ed. 1977) [hereinafter cited as 2 SHAWCROSS & BEAUMONT]. It did not go into effect until 1942 and only five countries ratified it. *Id.*

⁵⁸ A third organization—the International Air Traffic Association, composed of air carriers—had come into existence in 1919. SAND, PRATT & LYON, *supra* note 6, at 21-22.

C. The Period Since 1944

The second world war, like its predecessor, served to advance aviation technology substantially in virtually every respect, including the speed, range, capacity, and navigational accuracy of aircraft. As a result, the nations of the world appeared to have the ability to develop on an economic basis a truly international air transportation network spanning the entire globe. As the war drew to a close, the Allied Powers recognized the need to establish the legal and organizational foundations of the new era of international civil aviation, but they differed considerably on the basic principles which were to govern such a system.⁵⁹ The United States had attained a clear position of dominance in aviation capability, and certain countries, particularly the United Kingdom, were fearful of the emergence of an American monopoly against which they could not profitably compete.⁶⁰

In order to formulate the principles for post-war international aviation, the United States, after some preliminary discussions with other governments, convened at Chicago on November 1, 1944, an international conference whose objective was to "concern itself chiefly with matters of routes, land rights, and the general principles of air navigation and international air organization."⁶¹ The official invitation expressed the hope that "[t]his conference might also agree so far as possible upon the principles of a permanent international structure of civil aviation and air transport."⁶² Representatives of fifty-four states attended, and it appears that at least some were hopeful that the Chicago Conference would accomplish for international aviation what the Bretton Woods Conference, a few months earlier, had done for the international monetary system and post-war reconstruction.

⁵⁹ See notes 49-53 and accompanying text, *supra*.

⁶⁰ WAGNER, *supra* note 7, at 85-87.

⁶¹ Pre-conference letter of chairman Adolf A. Berle, then United States Assistant Secretary of State (quoted in Osterhout, *A Review of the Recent Chicago International Air Conference*, 31 VA. L. REV. 176, 176 (1945)).

⁶² 1 U.S. DEP'T OF STATE, PROCEEDINGS OF THE INTERNATIONAL CIVIL AVIATION CONFERENCE 11 (1948) [hereinafter cited as 1 PROCEEDINGS]. The Conference agenda consisted of four principal items: (1) multilateral aviation convention and international aeronautical body; (2) technical standards and procedures; (3) arrangements covering transitional period; and (4) consideration of establishment of Interim Council. *Id.* at 14-15.

The Chicago Conference had both a short-term and a long-term objective: to enable civil aviation to resume normal operations as soon as possible after the termination of hostilities and to establish a system to foster expansion of aviation in the post-war era.⁶³ Whereas the 1919 Paris Conference had been concerned with aviation's implications for national security, the Chicago Conference focused primarily on the economic consequences of aviation development and the way in which the individual states and their national airlines were to benefit from and participate in that development in the years ahead. The question was no longer merely: Who owns the sky? Rather, it was: Who owns the right to exploit international air transportation commercially and on what basis? "Freedom of the air" as a slogan had been replaced by "free trade by air."⁶⁴

The states at the conference advanced several distinct and conflicting positions on this question, reflecting to a large extent the state of their individual capabilities in the field of aviation. At one extreme, New Zealand, supported by Australia, proposed the creation of an international air transport authority, possibly attached to the United Nations, which would own aircraft and have exclusive right to operate them on international trunk routes.⁶⁵ Viewing international aviation as essentially an international public utility, rather than as a form of commerce which would only lead to conflict among the nations of the world, the New Zealand proposal appeared to be based on the assumption that the sky "belonged" to everyone, thus accepting neither the approach of the Little Prince nor that of the businessman. It was *res communis* (a common possession), not *res nullius* (a possession of no one).

At the other extreme, the United States, the leading air power at the conference, advocated a position essentially of "free enterprise" in international aviation and sought a legal framework in the form of a multilateral convention based on freedom of the air.⁶⁶ In its view, any international organization in the field of aviation should concern itself with technical matters such as navi-

⁶³ Waldo, *Sequels to the Chicago Aviation Conference*, 11 LAW & CONTEMP. PROB. 609, 609 (1946).

⁶⁴ SAND, PRATT & LYON, *supra* note 6, at 23.

⁶⁵ 1 PROCEEDINGS, *supra* note 62, at 77-80, 549-50.

⁶⁶ *Id.* at 544-66.

gation and safety and should have no jurisdiction over the economic issues.

The British, whose aircraft industry had been concentrated on the production of fighters during the war and would therefore require a significant readjustment to manufacture civilian transports,⁶⁷ took a position somewhere between the New Zealand proposal of international ownership of air services and the American position of free enterprise. Fearing the power of American air capability and believing that unlimited competition would only lead to increased subsidies for the various national airlines, they argued for "controlled development" of aviation, rather than free enterprise.⁶⁸ They urged the creation of an International Air Authority to assume responsibility for the expansion of post-war international aviation on an equitable basis among the states while assuring an equilibrium between air transport capacity and demand.⁶⁹ To achieve these goals, the Authority, in addition to having competence over technical matters, would have the power to determine the needed frequency of services to be operated by all countries on international routes, to fix the applicable rates, and to allocate participation in such services to the countries concerned.⁷⁰ In a somewhat similar vein, the Canadians also proposed an International Air Authority, which like the United States Civil Aeronautics Board, would issue permits to international carriers for particular routes and frequencies, and in doing so would take account of competitive factors.⁷¹

Thus, at the start of the Chicago Conference, the states approached the problem of organizing international aviation without a common theory or assumption. It was clear that if a comprehensive legal framework was to emerge from the Chicago meeting, major compromises would have to be made, or at least a con-

⁶⁷ Jennings, *Some Aspects of the International Law of the Air*, 75 RECUEIL DES COURS 513, 523 (1949) [hereinafter cited as Jennings]. As a result of a wartime agreement, the United States, on the other hand, concentrated on the production of long-range bombers and transport planes. The British felt that the United States could convert more easily than the United Kingdom to the production of civil aircraft after the war. *Id.*

⁶⁸ 1 PROCEEDINGS, *supra* note 62, at 568.

⁶⁹ *Id.* at 569.

⁷⁰ *Id.* at 566-70.

⁷¹ *Id.* at 570-91. See Jennings, *supra* note 67, at 524-25.

sensus reached, on the fundamental question of whether post-war international aviation would be organized as a business engaged in free enterprise, an internationally regulated industry, or an internationally owned public utility.

At this stage in the development of international air law, thinking and conceptualization had evolved to the point where scholars and government officials no longer referred to a generalized and undifferentiated "freedom of the air," but rather spoke of the freedom or privilege to enter the airspace of another state for a particular purpose. Such a functional analysis led to the recognition of the existence of the five freedoms of the air: 1) freedom to fly across the territory of a state without landing—often referred to as freedom of transit; 2) freedom to land for non-traffic purposes; 3) freedom to take traffic from the carrier's home country to a foreign country; 4) freedom to bring traffic from a foreign country to the home country; and 5) freedom to pick up and discharge traffic at intermediate points between the home country and the foreign country.⁷² The first two have been called the "political" or "technical" freedoms, and they are necessary, of course, to operate a service over or through a foreign country.⁷³ The last three are known as the commercial freedoms, and they are essential to exploit the traffic market of the foreign state itself.⁷⁴

After rejecting the New Zealand plan in the initial phases of the conference, the delegates spent most of the remainder seeking an acceptable formula by which the states might grant any or all of these five freedoms to each other in a single comprehensive multilateral agreement. A treaty granting all five was probably doomed from the start since it would have meant a virtual abandonment of the principle of sovereignty over airspace and would also have deprived the individual states of bargaining power to protect their national airlines, then in various stages of development. In the end, the inability of the two leading air powers, the United States and the United Kingdom, to reach a general agreement on the matter meant that the Chicago Conference was unable to achieve the multilateral framework its sponsors had sought.

⁷² Jennings, *supra* note 67, at 522.

⁷³ *Id.* at 522-23.

⁷⁴ *Id.*

The work of the Chicago Conference culminated in a lengthy Final Act⁷⁵ consisting of twelve resolutions and five appendices, four of which were draft international agreements to be opened for signature: the Interim Agreement on International Civil Aviation,⁷⁶ the Convention on International Civil Aviation,⁷⁷ the International Air Services Transit Agreement,⁷⁸ and the International Air Transport Agreement.⁷⁹ A fifth appendix contained twelve draft technical annexes treating such matters as communications, safety, air traffic control, and aircraft registration.⁸⁰

Of these documents, the agreement having the greatest continuing significance is the Convention on International Civil Aviation, originally signed in Chicago by thirty-two states⁸¹ and adhered to as of September 1, 1978, by 143 states.⁸² Specifically superseding the Paris Convention of 1919,⁸³ the Chicago Convention established in more lengthy and detailed form the basic, though incomplete,

⁷⁵ The complete text of the Final Act can be found in 1 PROCEEDINGS, *supra* note 62, at 113-372.

⁷⁶ Interim Agreement on International Civil Aviation, *opened for signature*, Dec. 7, 1944, *replaced*, Apr. 4, 1947, 59 Stat. 1516, E.A.S. No. 469. The aim of this agreement was to establish a provisional organization, known as the Provisional International Civil Aviation Organization, until such time (not to exceed three years) as the permanent convention came into effect. *Id.* at art. I, §§ 1 & 3.

⁷⁷ Chicago Convention, *supra* note 51.

⁷⁸ International Air Services Transit Agreement, *opened for signature*, Dec. 7, 1944, *entered into force*, Jan. 30, 1945, 59 Stat. 1693, E.A.S. No. 487 [hereinafter cited as International Agreement].

⁷⁹ International Air Transport Agreement, *opened for signature*, Dec. 7, 1944, *entered into force*, Feb. 8, 1945, 59 Stat. 1701, E.A.S. No. 488 [hereinafter cited as International Air Transport Agreement].

⁸⁰ 1 PROCEEDINGS, *supra* note 62, at 184. The intent of the technical annexes, according to the Final Act, was to achieve "[t]he largest possible degree of international standardization of practice in many matters . . . important to safe, expeditious and easy air navigation." *Id.* at 123. Accordingly, the Final Act urged "the States of the world, bearing in mind their present international obligations, . . . to accept these practices as ones toward which the national practices of the several States should be directed as far and as rapidly as may prove practicable." *Id.* at 124.

⁸¹ WAGNER, *supra* note 7, at 129.

⁸² 2 SHAWCROSS & BEAUMONT, *supra* note 57, at A4-A8.

⁸³ Article 80 of the Chicago Convention, *supra* note 51, provides as follows: Each contracting State undertakes, immediately upon the coming into force of this Convention, to give notice of denunciation of the Convention relating to the Regulation of Aerial Navigation signed at Paris on October 13, 1919, or the Convention of Commercial Aviation signed at Habana on February 20, 1928, if it is a party to either.

legal framework for international civil aviation and laid the foundations for an international organization, the International Civil Aviation Organization (ICAO), to assist in its development. In terms virtually identical to article 1 of the Paris Convention, the first article of the Chicago Convention reaffirmed that every state has complete and exclusive sovereignty over the airspace above its territory.⁸⁴ Article 5, on the other hand, purported to grant the contracting parties the first two freedoms of transit and of landing for non-technical purposes; however, it specifically provided that such privileges were only to apply to "aircraft not engaged in scheduled international air services."⁸⁵ Thus, the enjoyment by an air carrier in its regularly scheduled operations of any of the five freedoms would require the conclusion of a separate agreement between the state of the air carrier and the foreign country whose airspace the carrier intended to enter.⁸⁶

Apparently the reason that the Convention distinguished scheduled from nonscheduled services and granted the latter the first two freedoms was that nonscheduled services at the time did not have great commercial or economic significance.⁸⁷ It did not, however, give carte blanche to the commercial development of non-

⁸⁴ Chicago Convention, *supra* note 51, at art. 1.

⁸⁵ Chicago Convention, *supra* note 51, at art. 5. Article 6 of the Chicago Convention, *supra* note 51, reinforces this provision when it states, "[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization." The Convention also specifically states that its provisions are inapplicable to "state aircraft," which includes aircraft used in military, police, and customs services. *Id.* at art. 3. Aircraft belonging to state-owned airlines are not to be considered state aircraft.

⁸⁶ For example it was a valid exercise of sovereignty, in keeping with the provisions of the Chicago Convention, when certain African states in 1963 prohibited South African Airways from over-flying their territories. 1 SHAWCROSS & BEAUMONT, *supra* note 27, at 192.

⁸⁷ Cheng, *Beyond Bermuda*, in INTERNATIONAL AIR TRANSPORT: LAW, ORGANIZATION AND POLICIES FOR THE FUTURE 81, 82 (N. Matte ed. 1976) [hereinafter cited as Cheng]. Although the Convention itself does not define the term "scheduled international air service," the ICAO Council has defined it as a series of flights that a) pass through the airspace over the territory of more than one state; b) is performed by aircraft for the transport of passengers, mail or cargo for remuneration in such a manner that each flight is open to use by members of the public; and c) is operated, so as to serve traffic between the same two or more points, either according to a published time table or with flights so regular or frequent that they constitute a recognizable system series. ICAO Doc. 7278—C/841 (1952).

scheduled service, for it specifically provided that aircraft engaged in carriage for hire on other than a scheduled basis had the privilege of taking on and discharging passengers, cargo, or mail "subject to the right of any state where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."⁸⁸ This final provision enabled any state to regulate the exercise of the commercial freedoms by non-scheduled aircraft virtually to the same extent as scheduled services. The implications of the Chicago Convention were clear: the development of scheduled international air service, and to a significant extent unscheduled service as well, would necessitate further agreement among the states. Such agreement might be arrived at either on a multilateral or bilateral basis.

Two of the other agreements that emerged from the Chicago Conference represented an attempt to provide a multilateral approach to the problem. The first was the International Air Services Transit Agreement,⁸⁹ otherwise known as "The Two Freedoms Agreement," by which each contracting party granted to all other contracting parties with respect to scheduled international air services, "(1) The privilege to fly across its territory without landing; (2) The privilege to land for non-traffic purposes."⁹⁰ This agreement if accepted by most of the nations of the world would facilitate significantly the attainment of a global air transportation network, for it would enable states that wished to establish air service with one another to do so on a bilateral basis without the involvement or authorization of the intermediate countries flown over.⁹¹ As of September, 1978, ninety-two nations, including the United States, had become parties to the agreement.⁹²

The exercise of the two freedoms is, however, subject to cer-

⁸⁸ Chicago Convention, *supra* note 51, at art. 5. With the increase in importance of nonscheduled service, commercial nonscheduled flights have become as much subject to prior authorization as scheduled services. Cheng, *supra* note 87, at 82-83.

⁸⁹ See note 78, *supra*.

⁹⁰ International Agreement, *supra* note 78, at art. I, § 1. The Agreement itself does not define "non-traffic purposes," however, article 96(d) of the Chicago Convention defines "stop for non-traffic purposes" as "a landing for any purpose other than taking on or discharging passengers, cargo or mail." Chicago Convention, *supra* note 51, at art. 96(d).

⁹¹ WAGNER, *supra* note 7, at 142.

⁹² See 2 SHAWCROSS & BEAUMONT, *supra* note 57, at A4-A8.

tain conditions, including the provisions of the Chicago Convention, the use of routes and airports designated by the state whose airspace is entered, and the payment of reasonable charges for the use of airports and other facilities.⁹³ In addition, a contracting state granting to the airlines of another state the privilege of stopping for non-traffic purposes may require such airline to offer reasonable commercial service at the points at which the stops are made.⁹⁴

The Chicago Conference also prepared the draft of the International Air Transport Agreement,⁹⁵ commonly known as the "Five Freedoms Agreement," by which each contracting party gave the other contracting parties all five of the freedoms of the air. While its draftsmen obviously intended it to be the basis for a truly multilateral framework founded upon principles of free enterprise, the Agreement was never able to overcome the fundamental opposition to such a concept expressed by many nations at the Conference. In the end, in addition to the United States, only a few widely scattered small countries ever ratified the Agreement, and the United States itself, in the face of this dissension, ultimately denounced the Agreement in 1946;⁹⁶ consequently, it never become an effective means for cooperation in international air services.

The failure of the Chicago Conference to formulate a comprehensive multilateral framework meant that international aviation in the post-war era would have to develop on the basis of bilateral agreements between concerned states. The delegates themselves were clearly aware of this possibility, for the Final Act⁹⁷ included a standard form bilateral agreement to be used in such cases.⁹⁸ In fact, it would significantly influence the language and form of the numerous bilateral agreements concluded after the war. Under such "Chicago-type" agreements, the contracting parties granted

⁹³ International Agreement, *supra* note 78, at art. I, § 4.

⁹⁴ *Id.* at art. I, § 3.

⁹⁵ International Air Transport Agreement, *supra* note 79.

⁹⁶ 1 SHAWCROSS & BEAUMONT, *supra* note 27, at 209. This took effect from July 25, 1947 as a result of a notice of denunciation given by the United States on July 25, 1946. *Id.* As of January 1977, only twelve states remained parties to the convention. *Id.*

⁹⁷ 1 PROCEEDINGS, *supra* note 62, at 127-29.

⁹⁸ 1 SHAWCROSS & BEAUMONT, *supra* note 27, at 210.

each other specified rights (transit, non-traffic stops, or commercial entry) over described routes, including the designated ports of call at which the commercial rights of embarkation or debarkation of passengers and cargos were permitted. Moreover, they set down basic principles of non-discrimination and mutuality of treatment.

The Chicago model did not, however, specifically deal with the economic allocation of the burdens and benefits arising out of such bilateral service, nor did it refer to such matters as frequencies, capacities, and rates. It was precisely the need to regulate these issues which had led the United Kingdom to oppose the United States proposal of basing commercial international aviation on free competition. After the Chicago Conference, the two countries, meeting in Bermuda, finally did resolve their differences in a statement of principles known as the Bermuda Plan which was eventually incorporated into their 1946 Air Services Agreement,⁹⁹ commonly referred to as the Bermuda Agreement. A compromise between the United States' position of free enterprise and the British position of controlled development,¹⁰⁰ the Bermuda Agreement granted each of the parties the two technical freedoms but provided that the three commercial freedoms could be exercised only in accordance with certain conditions so as to enable each party to have an equal opportunity to share equitably in the economic benefits to be derived from air transportation between their respective countries. Thus, each party could enjoy the commercial privileges at designated airports and predetermined routes only so long as certain general principles (known as the Bermuda Capacity Principles) were respected: air transport facilities available to the traveling public were to bear a close relationship to the public's requirements for such transport; the carriers of each nation were to have a fair and equal opportunity to operate on any designated route between the two territories; and the interests of the carriers of the other country were to be taken into consideration

⁹⁹ Agreement Between the Government of the United States of America and the Government of the United Kingdom Relating to Air Services Between Their Respective Territories, *signed*, Feb. 11, 1946, 60 Stat. 1499, T.I.A.S. No. 1507 [hereinafter cited as Bermuda I].

¹⁰⁰ See generally Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. AIR L. & COM. 419, 420 (1975).

so as not to affect unduly the services which the latter provided on the same route.¹⁰¹ The Agreement itself did not set specific limits on capacity, but if a government believed that a foreign airline was not respecting the above-mentioned conditions, it could request consultation with the other government on the matter.¹⁰² This ex post facto review represented an effort to harmonize predetermination of capacity originally demanded by the United Kingdom with total free enterprise initially proposed by the United States. In addition, the United States agreed to a machinery for the control of rates in the form of the International Air Transport Association (IATA),¹⁰³ an organization of carriers originally established in 1919 and revived after World War II. IATA would play an important role in the development of civil aviation in the post-war era.

The Bermuda agreement set the pattern for international aviation development in the following years, and as a result today the legal foundations of international air transportation rest on an intricate network of over 1200 bilateral agreements.¹⁰⁴ A combination of a commercial arrangement and a set of regulatory measures,¹⁰⁵ the post-war bilateral air services agreement has generally drawn its form from the Chicago model but has derived its substance with respect to economic rights from the Bermuda Agreement. Standard provisions in such agreements deal with designation of routes covered; rates and their approval and/or disapproval; safety standards; charges for the use of public airports and other facilities; customs treatment of fuel, oil, and spare parts; principles to govern competition and capacity; and mechanisms for the settlement of disputes.

Although the Chicago Conference failed to promulgate the economic rules of the game, it did succeed in formulating numerous detailed technical rules in the Final Act's Annexes, covering such matters as communication systems and navigational aids,

¹⁰¹ Bermuda I, *supra* note 99, at §§ 4, 5, 6.

¹⁰² *Id.* § 9.

¹⁰³ Bermuda I, *supra* note 99, at Annex II.

¹⁰⁴ Goedhuis, *The Changing Legal Regime of Air and Outer Space*, 27 INT'L & COMP. L.Q. 576, 579 (1978).

¹⁰⁵ Gertler, *Bilateral Air Transport Agreements: Non-Bermuda Reflections*, 42 J. AIR L. & COM. 779, 817 (1976).

characteristics of airports and landing areas, rules of the air and air traffic control practice, airworthiness of aircraft, registration and identification of aircraft, log book requirements, aeronautical maps and charts, customs procedures, and search, rescue and investigation of accidents.

The annexes themselves, however, have no application within the territory of the individual contracting states. The signatories to the Final Act were merely urged to accept the practices defined therein as ones toward which their national practices should be directed "as far and as rapidly as may prove practicable."¹⁰⁶ By virtue of article 12 of the Convention, a contracting state "undertook" to keep its own regulations, to the greatest possible extent, uniform with those established under the Convention and to ensure that every aircraft flying over its territory and all aircraft carrying its nationality respected the regulations governing flight; however, it was not *bound* to do so, but could enact different regulations if it so chose. Thus, here too, the principle of sovereignty prevailed, for each contracting party maintained its own legislative autonomy. Over the high seas, where the sovereignty of the individual states does not extend, the Convention provides that the rules in force shall be those established under the Convention.¹⁰⁷ The problem was that the Convention itself, as distinguished from the technical annexes to the Final Act, set down virtually no rules relating to flight.¹⁰⁸

To foster the development of such rules, as well as international aviation in general, the Chicago Convention established the legal foundations of the International Civil Aviation Organization (ICAO), thus replacing both ICAN and CITEJA. According to article 44 of the Convention, the objectives of ICAO are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- (a) Insure the safe and orderly growth of international civil aviation throughout the world;

¹⁰⁶ 1 PROCEEDINGS, *supra* note 62, at 124.

¹⁰⁷ Chicago Convention, *supra* note 51, at art. 12.

¹⁰⁸ T. BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 80 (1969) [hereinafter cited as BUERGENTHAL].

- (b) Encourage the arts of aircraft design and operation for peaceful purposes;
- (c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
- (e) Prevent economic waste caused by unreasonable competition;
- (f) Insure that the rights of the contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between contracting States;
- (h) Promote safety of flight in international air navigation;
- (i) Promote generally the development of all aspects of international civil aeronautics.¹⁰⁹

Despite the breadth of these objectives, ICAO's power to achieve them through binding rules and regulations is extremely limited.

Under article 37 of the Convention, ICAO's Council is empowered to adopt and amend such international standards and recommend practices on a variety of specified technical matters largely relating to aviation safety, regularity and efficiency.¹¹⁰ Over the years, the Council has adopted a significant number of such international standards and recommended procedures (SARPS) in the form of Annexes to the Convention. While member states under article 37 undertake "to collaborate in securing the highest practicable degree of uniformity in regulations, standards and procedures,"¹¹¹ they are not bound by ICAO Annexes but may deviate therefrom where compliance is impracticable.¹¹² In such case, they must give official notification to the organization of any differences between their own practices and those established by the ICAO international standard.¹¹³ In addition to the above men-

¹⁰⁹ Chicago Convention, *supra* note 51, at art. 44.

¹¹⁰ Chicago Convention, *supra* note 51, at art. 37. Under article 90(a) of the Chicago Convention, *supra* note 51, the adoption of an annex authorized in article 54 requires a two-thirds vote of the Council, then submission to each contracting state. It becomes effective three months after submission unless a majority of member states register their disapproval with the Council. Chicago Convention, *supra* note 51, at art. 90(a).

¹¹¹ Chicago Convention, *supra* note 51, at art. 37.

¹¹² *Id.* at art. 38.

¹¹³ *Id.* In practice, many states fail to notify ICAO of such differences. "[A]s a general proposition, no state or pilot can justifiably rely on the absence of

tioned legislative functions, the ICAO has also worked for the development of international air law through the preparation of treaties and conventions affecting various issues such as hijacking and the recognition of property rights in aircraft;¹¹⁴ however, it has not experienced unqualified success in this area.

ICAO is therefore by no means a supra-national lawmaking body and its limited legislative powers are subject to the sovereignty of the individual member states. It may be argued that this structure once again represents the triumph of unilateral action over international rules and is therefore a retrograde step from what existed under its predecessor, the International Commission for Air Navigation,¹¹⁵ which had the power to bind member states to its technical rules. On the other hand, compliance with technical standards depends to a significant extent on the economic means of a member state, rather than on its political ideology. Since the extent of economic means varies so dramatically among the nations of the world, the noncompulsory nature of the ICAO's rules is probably a realistic way of advancing airline security and efficiency while trying to accommodate the disparities in national development¹¹⁶—an application of the truism that the Little Prince learned in his travels: "One must require from each one the duty which each one can perform . . . Accepted authority rests first of all on reason!"¹¹⁷

The Chicago Convention, coupled with the Bermuda Agreement, established a basic framework for international aviation in

reported differences as indicia that a particular standard established in an Annex is in force in or being complied with by a state which has not filed the notice required by Article 38." BUERGENTHAL, *supra* note 108, at 100.

¹¹⁴ See generally FitzGerald, *The International Civil Aviation Organization and the Development of Conventions on International Air Law (1947-1978)*, 3 ANNALS AIR & SPACE L. 51-120 (1978).

¹¹⁵ The technical annexes of the 1919 Paris Convention were not merely goals toward which the states should strive, but were as binding on the contracting parties as other provisions of the Convention. Moreover, the International Commission for Air Navigation had the power, by a three-fourths vote of its members, to amend the annexes and such amendments also bound the individual member states. Paris Convention, *supra* note 25, at art. 34. See BUERGENTHAL, *supra* note 108, at 119. The power of ICAN to bind member states was one of the reasons for the refusal of the United States to ratify the 1919 Paris Convention. WAGNER, *supra* note 7, at 88.

¹¹⁶ BUERGENTHAL, *supra* note 108, at 121.

¹¹⁷ A. DE SAINT EXUPERY, *THE LITTLE PRINCE* 38 (K. Woods trans. 1943).

the post-war era, a framework that sought to accommodate the basic tensions arising from the conflicts between national sovereignty and freedom of the sky, free enterprise and order in the air, multilateral cooperation and unilateral action, and nondiscrimination and national favoritism. The framework had major gaps, but it nonetheless permitted international aviation to achieve significant development for over thirty years. New forces would arise in the world to introduce further conflict and tensions into the prevailing regime of international air law.

III. CONFLICTS PRESENT

The major technological, economic, and political changes to which the world has been subjected since 1944 have placed significant stress on public international air law as they have on the entire fabric of international law. Before examining the tensions which they have engendered, it may be appropriate to look first at the nature of these forces of change.

A. *The Forces of Change*

Vast advances in aviation technology, particularly with respect to long-range, wide-bodied jet aircraft, have greatly increased the utility of international aviation to mankind and have resulted in a dramatic expansion of the aviation market far beyond the expectations of the delegates at the Chicago Conference. At the same time, the costly nature of this technology has meant that states and carriers seeking to participate in any meaningful way in international aviation have had to commit substantial capital and human resource to the endeavor. While advances in technology have yielded benefits to human commerce and interchange, they have also brought aviation to the point where it has the capacity to injure the environment through pollution and other factors.

The years since 1944 also witnessed major changes in the international economy. A significant shift in wealth from the West—and from the United States in particular—to other parts of the world has taken place. With that shift has come the emergence of new centers of power which now insist on a voice in international lawmaking and which cannot easily be overridden as was often

the case in the past. A major reason for this shift in wealth, of course, has been the dramatic increase in world fuel and energy costs which began in the early 1970's as a result of the concerted pricing action by the oil producers in the face of growing demand by the industrialized nations. This factor has had a direct and immediate impact on civil aviation in the form of rapidly escalating operating costs, which when coupled with increased capital outlays, has resulted in reduced carrier profit margins, a powerful force prompting the nations of the world to take action to protect their national carriers.

Beyond these technological and economic changes is the fact that the international community has undergone a profound structural revolution¹¹⁸ since World War II as a result of decolonization and the emergence of numerous new nations. In general, the new nations have not been content to leave international aviation to the old, industrialized powers, but have instead sought to participate in it in varying degrees. Not only have they subscribed to the Chicago Convention and become members of ICAO, but they have also established their own international air carriers despite the fact that many do not possess sufficient material and technical resources to compete effectively in the international market. While some scholars have lamented this phenomenon, considering such airlines to be "non-viable,"¹¹⁹ the new nations of the world, taking seriously their right to a fair opportunity to operate international airlines, suggested by Article 44 of the Chicago Convention, have viewed a national carrier as an essential attribute of national identity and an indispensable link to the outside world. For them, international aviation is definitely not just a business. As a result, their governments have actively sought to protect their national airlines by imposing various restrictions and conditions on foreign competitors operating in their territories.¹²⁰

The existence of numerous new states with so many different traditions, cultures and ideologies has also vastly complicated the process of reaching agreement on international legal principles in

¹¹⁸ Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 1, 4 (1978).

¹¹⁹ Goedhuis, *The Changing Legal Regime of Air and Outer Space*, 27 INT'L & COMP. L.Q. 576, 581 (1978).

¹²⁰ *Id.*

general and international air law in particular. The international aviation community has shifted from a rather homogeneous club of western industrialized countries to a heterogeneous group which now includes economies in various stages of development and reflecting divergent ideologies. Solutions to international problems can no longer be imposed by a few western states, but must instead be achieved slowly and patiently through consensus. The Law of the Sea Conference,¹²¹ a lengthy and arduous process, perhaps best illustrates the magnitude of the task of forging any new regime for international aviation. At the same time, the advent of so many new states has made the bilateral approach to international air transport regulation an extremely difficult process indeed.

The substantial increase in the number of states alone significantly complicates arriving at a consensus on any issue relating to international aviation. Moreover, many of the new states do not share the economic and political ideologies and assumptions that prevailed among the western nations who dominated aviation at the time of the Chicago Conference. For example, many base their economies on central planning, rather than market forces, and virtually all view theories of "free enterprise," "economic competition," and "comparative advantage in international trade" with suspicion as doctrines that merely allow rich nations to become richer at the expense of the poor. Out of feelings of past exploitation and a desire for an increased share in the wealth of the world has come a demand for a "new international economic order," the principles of which are expressed in such documents as the Charter of Economic Rights and Duties of States,¹²² adopted by the General Assembly of the United Nations in 1975. While the Charter does not mention aviation specifically,¹²³ it seems fairly clear that the new states are seeking a new

¹²¹ See generally Oxman, *The Third United Nations Conference on the Law of the Sea: The Seventh Session* (1978), 73 AM. J. INT'L L. 1 (1979).

¹²² G.A. Res. 3281, U.N. Doc. A/RES/3281 (xxix) (1975), reproduced in 14 INT'L LEGAL MATERIALS 251 (1975).

¹²³ Article 27 of the Charter, however, specifically deals with invisible trade, a term which clearly includes international commercial aviation. It provides as follows:

1. Every State has the right to enjoy fully the benefits of world trade and to engage in the expansion of such trade.
2. World invisible trade, based on efficiency and mutual and equit-

international economic order, not only in trade and investment, but also on the seas and in the air as well.¹²⁴

B. *The Resulting Conflicts*

The above mentioned forces of change have created both economic and political conflicts in public international air law today.

1. *Economic Conflicts*

The introduction of new aviation technology in the form of wide-bodied jet aircraft, as well as the advent of numerous new carriers, both scheduled and non-scheduled, resulted in the creation of significant over-capacity in international aviation.¹²⁵ This over-capacity, when coupled with rising fuel and operational costs, led to rapidly declining profit margins for many national carriers and ultimately to demands that their governments take action to protect them. Gradually pressure began to mount to revise the Chicago-Bermuda regime determining how the nations of the world share in the economic benefits of international aviation. The protectionist movement reached a peak when the United Kingdom, alleging that Bermuda I gave benefits to American carriers much in excess of those conferred on British carriers, denounced the Bermuda Agreement on June 22, 1976, and requested the negotiation of a new air services agreement between the two countries.¹²⁶ After protracted and heated discussions, the

able benefit, furthering the expansion of the world economy, is the common goal of all States. The role of developing countries in world invisible trade should be enhanced and strengthened consistent with the above objectives, particular attention being paid to the special needs of developing countries.

3. All States should co-operate with developing countries in their endeavours to increase their capacity to earn foreign exchange from invisible transactions, in accordance with the potential and needs of each developing country and consistent with the objectives mentioned above.

14 INT'L LEGAL MATERIALS 251, 260 (1975).

¹²⁴ Abraham, *Politiques Aeriennes Internationales Vues Par la France*, in INTERNATIONAL AIR TRANSPORT: LAW, ORGANIZATION AND POLICIES FOR THE FUTURE 3 (N. Matte ed. 1976). See also Koffi, *Contribution Africaine Au Developpement du Transport Aerien International*, in INTERNATIONAL AIR TRANSPORT: LAW, ORGANIZATION AND POLICIES FOR THE FUTURE 23 (N. Matte ed. 1976).

¹²⁵ Comment, *Bermuda II: The British Revolution of 1976*, 44 J. AIR L. & COM. 111, 114-15 (1978).

¹²⁶ *Id.* at 113-15.

two states eventually hammered out an agreement, commonly known as Bermuda II,¹²⁷ which represented yet a further departure from the limited free enterprise position of Bermuda I in the direction of an internationally regulated industry, a position the British had espoused at Chicago over thirty years before.

Under Bermuda II, the United States not only lost fifth freedom rights to many European cities and accepted limitations on designated airlines, but the parties also agreed to express controls on capacity. To a significant extent, the British approach reflected a demand not for an equal opportunity to compete, but rather for an equal share in the benefits of commercial aviation between the two countries. Implicit in this position is the concept that one state has a right to—indeed “owns”—a definite share in the air traffic between the countries.¹²⁸ While the concept of “ownership” of air traffic like ownership of the stars, might startle the Little Prince, it would appear to have figured in the thinking of various carriers, including at times those in the United States.¹²⁹ The age old question of “who owns the air?” had taken on a new dimension by the 1970’s.

For the developing nations, if not for others, the concept of ownership of the benefits of air traffic is far from absurd. The Charter of Economic Rights and Duties of States sets down the principle that economic and political relations among states are to be governed by “mutual and equitable benefit,”¹³⁰ and its basic emphasis throughout is upon an equitable sharing of economic activities, rather than upon an equal opportunity to compete for them. At the same time the Charter also provides that “Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural

¹²⁷ Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Air Services, signed, July 23, 1977, 28 U.S.T. 5367, T.I.A.S. No. 8641, as amended, Apr. 25, 1978, 29 U.S.T. —, T.I.A.S. No. 8965 [hereinafter cited as Bermuda II]. See generally Comment, *Bermuda II: The British Revolution of 1976*, 44 J. AIR L. & COM. 111 (1978).

¹²⁸ Wassenbergh, *Bilateral Ad Absurdum in International Air Transportation?*, in INTERNATIONAL AIR TRANSPORT: LAW, ORGANIZATION AND POLICIES FOR THE FUTURE 127 (N. Matte ed. 1976).

¹²⁹ Wassenbergh, *supra* note 3, at 24.

¹³⁰ G.A. Res. 3281, U.N. Doc. A/RES/3281 (xxix) (1975), reproduced in 14 INT’L LEGAL MATERIALS 251, 254 (1975).

resources and economic activities.”¹³¹ The desire for a more equitable share of trade, when coupled with a reaffirmation of sovereignty over national wealth and economic activities, has led many states to abandon equality of opportunity as an underpinning of the trade system and to espouse an equitable share in its benefits as a goal of the new international economic order. At the same time, it is well to point out that in the area of international aviation as in many other areas, the developing nations do not constitute a monolith and that certain of them are prepared to compete on a more liberal basis than are many established European powers.

The United States and certain other countries have not, however, accepted the idea of international aviation as a tightly regulated industry in which countries have a fixed share of the benefits.¹³² In reaction to Bermuda II, the United States has sought to negotiate new agreements emphasizing competition and free enterprise, and has enacted legislation to establish guidelines for future bilateral negotiations on this basis.¹³³

Having deregulated domestic civil aviation, it would appear that the United States is seeking to foster the deregulation of international air transportation as well. The achievement of that goal will of course necessitate agreement among sovereign states. In view of the ideological and economic diversity prevailing in the world today, one ought not to assume, particularly in light of the history of international air law to date, that such agreement will be arrived at easily or at all. To assume that it can be achieved through “flexibility” or “innovative strategies”¹³⁴ is to underestimate the profound and fundamental nature of the conflict between the concept of air transportation as a business which relies on market forces and competition on the one hand and that of air transportation as an internationally regulated industry in which the nations of the world share equitably on the other. Wassenbergh

¹³¹ 14 INT’L LEGAL MATERIALS 251, 254-55 (1975).

¹³² See Klem & Leister, *The Struggle for a Competitive Market Structure in International Aviation: The Benelux Protocols Take United States Policies a Step Forward*, 11 LAW & POL’Y INT’L BUS. 557, 567-68 (1979) [hereinafter cited as Klem & Leister].

¹³³ International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (1980) (to be codified in scattered sections of 49 U.S.C.).

¹³⁴ See Klem & Leister, *supra* note 132, at 592.

pointed to the difficulty in a recent article when he stated: "There is no compromise possible between competition and protection. The compromise to be sought is the definition of 'fair' competition."¹³⁵ A definition of fair competition, of course, raises the issue of equity in international aviation, and equity is precisely the objective of those who seek a new international economic order.

A further area of economic conflict concerns the charges that air carriers are required to pay to foreign governments for the use of airports, airways, and related facilities.¹³⁶ Because of the technological demands of modern aviation, the states of the world have been required to make increasingly large investments in needed facilities and equipment. To recover these costs, they have felt justified in imposing increasing charges on the carriers who use them.¹³⁷ Viewing such charges as a burden that is fast becoming unbearable, the airlines have argued that user charges are often imposed in a discriminatory manner and are also unreasonable in that they may have no relationship to the actual cost of use.¹³⁸ Thus far, the provisions of international law as found in existing multilateral and bilateral agreements appear inadequate to resolve the problem.¹³⁹ For example, article 15 of the Chicago Convention requires that charges for the use of airports and air navigation facilities imposed on aircraft engaged in international service be non-discriminatory;¹⁴⁰ however, it does not specifically require that such charges be reasonable in light of the use actually made of the facilities in question, nor does it provide a remedy for charges in contravention of its provisions. The United States has attempted a unilateral solution through the International Air Transportation Fair Competitive Practices Act of 1974¹⁴¹ which empowers the Secretary of the Treasury to levy compensatory charges (similar to a countervailing duty) on carriers of the foreign

¹³⁵ Wassenbergh, *Towards a New Model Bilateral Air Transport Services Agreement?*, 3 AIR L. 197, 209 (1978).

¹³⁶ See generally Pogue & Davidson, *User Charges in International Aviation*, 73 AM. J. INT'L L. 42 (1979).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 46.

¹⁴⁰ Chicago Convention, *supra* note 51, at art. 51.

¹⁴¹ Pub. L. No. 93-623, 88 Stat. 2102 (codified at 49 U.S.C. §§ 1151 note, 1160, 1373, 1376-77, 1472 and 1517 (1976)).

country that has imposed unreasonable or discriminatory user charges, but it would seem that this subject will only find a satisfactory resolution through the conclusion of a multilateral treaty.

The ideological diversity among the states of the world has also led to conflicts of a political nature, one of the most significant of which concerns the proper solution to be applied to the suppression of aerial hijackings and other crimes on board aircraft in international flight. Because the problem of aerial hijackings is international in scope, national legislative solutions, unless enacted by all states throughout the world, would hardly be an effective deterrent. On the other hand, existing principles of international law have not until recently dealt directly with the problem, and analogy to the traditional law of piracy proved to be of little help.¹⁴³

Problems of jurisdiction,¹⁴³ one of the essential attributes of state sovereignty, prevented effective measures to deter and punish the perpetrators of crimes on board aircraft. A jurisdictional issue lay in the question of which state had jurisdiction over the offense. In a particular case, a conflict of jurisdiction might exist, for example, between the state of registry and the state in whose airspace the crime was committed. Indeed, there might be uncertainty as to whether any state had jurisdiction at all, in a case in which the state of registry did not claim jurisdiction over crimes on board its aircraft and the incident took place in airspace over the high seas. Extradition was a further problem¹⁴⁴ since many states refused to extradite their nationals, would not do so in case of political offenses, or would only extradite if they were a party to a treaty with the state to which the individual concerned was to be extradited.

It was therefore readily apparent that the only effective solution to the problem was to be found in a multilateral treaty covering criminal offenses on board aircraft. Toward this end, the nations of the world undertook a piecemeal solution¹⁴⁵ through the

¹⁴³ See generally N. JOYNER, *AERIAL HIJACKING AS AN INTERNATIONAL CRIME* (1974).

¹⁴³ See generally S. SHUBBER, *JURISDICTION OVER CRIMES ON BOARD AIRCRAFT* (1973).

¹⁴⁴ 1 SHAWCROSS & BEAUMONT, *supra* note 27, at 522.

¹⁴⁵ Emanuelli, *Legal Aspects of Aerial Terrorism: The Piecemeal vs. The Comprehensive Approach*, 10 J. INT'L L. & ECON. 503, 504-05 (1975) [hereinafter cited as Emanuelli].

preparation over a decade of three separate treaties: the 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft;¹⁴⁶ the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft;¹⁴⁷ and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.¹⁴⁸

The elaboration of these Conventions, which was not achieved without a certain degree of political conflict,¹⁴⁹ has made a substantial contribution toward defining international legal principles applicable to unlawful interference with international civil aviation. The Tokyo Convention, article 3, recognizes that the state of registration has jurisdiction over offenses and acts committed on board and specifically requires that state to take such measures as may be necessary to exercise its jurisdiction over offenses committed on board aircraft so registered.¹⁵⁰ Insofar as hijacking is concerned, the Convention commits the contracting parties to take "all appropriate measures to restore control of the aircraft to its lawful commander and to preserve his control of the aircraft," as well as to permit the aircraft, after release, to continue its journey as soon as practicable.¹⁵¹ On the other hand, a contracting state is not obliged to extradite an offender who comes within its jurisdiction;¹⁵² consequently, the Tokyo Convention offers little real deterrence to hijacking.

With the increase in aerial terrorism in the late 1960's and early 1970's, the international community sought to establish a specific deterrence regime through the Hague and Montreal Conventions.

¹⁴⁶ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *done*, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 [hereinafter cited as Tokyo Convention].

¹⁴⁷ Convention for the Suppression of Unlawful Seizure of Aircraft, *done*, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 [hereinafter cited as Hague Convention].

¹⁴⁸ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done*, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570 [hereinafter cited as Montreal Convention].

¹⁴⁹ See FitzGerald, *The International Civil Aviation Organization and the Development of Conventions on International Air Law (1947-1978)*, 3 ANNALS AIR & SPACE L. 51, 95-96 (1978).

¹⁵⁰ Tokyo Convention, *supra* note 146, at art. 3.

¹⁵¹ *Id.* at art. 11.

¹⁵² *Id.* at art. 16(2).

These agreements define as an offense various acts of intentional interference with international civil aviation and oblige each contracting state to make such acts punishable under its own law by severe penalties.¹⁵³ Furthermore, they oblige all contracting states in which the offender may be found either to prosecute such person or extradite him or her to a state having appropriate jurisdiction as specified in the Convention.¹⁵⁴ Thus, the basic scheme of the treaties is to create a credible deterrence against terrorism by insuring that the offender will be punished some place. The effectiveness of this scheme presupposes that most of the states of the world are contracting parties and that no safe haven exists. Unfortunately, many states have declined to ratify them. As of 1978, out of 149 United Nations members, eighty-eight had ratified the Tokyo Convention, eighty-six had ratified the Hague Convention, and eighty-four had ratified the Montreal Convention.¹⁵⁵ As a result, safe havens, such as Algeria, Cuba, and Libya¹⁵⁶ do continue to exist.

The refusal to participate in these treaty schemes is due to the unwillingness of many states, particularly the new states, to give up sovereignty over political actions and to participate in the punishment of offenders with whose ideological motivations they fundamentally sympathize.¹⁵⁷ Moreover, the preference of sovereignty over international legal principles in some countries may stem from a fear in weak regimes that state action against hijackings in particular cases as required by treaty would subject the government in question to dangerous domestic reaction or else injure its relations with allies who sympathize with such extremism. In any event, in this area of international air law, as in so many others, a truly effective multilateral solution remains to be achieved.

¹⁵³ Hague Convention, *supra* note 147, at art. 2; Montreal Convention, *supra* note 148, at art. 3.

¹⁵⁴ Hague Convention, *supra* note 147, at art. 7; Montreal Convention, *supra* note 148, at art. 7.

¹⁵⁵ Barrett, *Terrorism and the Airline Passenger*, 128 NEW L.J. 499, 499 (1978).

¹⁵⁶ See U.S. DEP'T OF STATE, TREATIES IN FORCE 253 (1979). Libya has however signed the Tokyo Convention. *Id.*

¹⁵⁷ Emanuelli, *supra* note 145, at 517.

IV. CONCLUSION

Public international air law may now be facing a state of major transition as a result of the tensions discussed above. It is unclear, however, whether the states of the world will seek solutions in unilateral action or in the formulation of generally accepted international principles. In short, one may ask whether we are moving progressively toward a rule-oriented system of international aviation or toward one dominated by power politics. What indeed are the forces which will shape air law in the future? Having experienced Bermuda II, can we now expect Chicago II, the long-awaited multilateral framework which will set down a comprehensive system for the regulation of international civil aviation?

One may of course criticize the present system of bilateral agreements on grounds of extreme complexity and therefore urge its replacement by a truly multilateral framework, if only for purposes of simplicity. On the other hand, the post-war regime of bilateral agreements has shown itself remarkably flexible in meeting changing circumstances over the years. Individual bilateral agreements, like cells in an organism, have been subjected to a process of renewal through virtually constant renegotiation, and as a result the system as a whole has been revised and adapted to meet new challenges.

The international community is undoubtedly far too pluralistic to arrive in the very near future at a comprehensive, global system of rules. Moreover, it is highly unlikely, given present national attitudes, that any system which does emerge will be based on principles of open skies and free competition. While certain advocates in the United States may be tempted to raise these principles to the level of natural law (if not moral precepts) just as the businessman did in asserting his claim to the stars, it must be recognized that much of the rest of the world views them with suspicion, if not outright skepticism. Any multilateral framework must take account of the disparate aspirations and capabilities of a multitude of countries, and accordingly may have to devise means to allow certain groups to participate more effectively. Toward this end, it might therefore be necessary to accord certain nations special privileges, similar to generalized preferences granted developing coun-

tries in international trade. For example, airlines from small countries might be granted disproportionate opportunities in the markets of larger countries as a means of encouraging their development. On the other hand, rather than seeking a global framework at the outset, it may be more feasible to focus on the creation of regional groupings, either for purposes of exchanging rights among their members or for negotiating as a block with outside countries.

Thus far international civil aviation has been viewed as a business, a phenomenon resulting at least in part from the economic orientation of the western nations who pioneered its development and dominated the Chicago Conference. It may well be, however, that many nations, faced with capital and energy costs, as well as fuel shortages, may eventually join together to organize their air services as an internationally owned public utility, so as to achieve the most efficient use of available resources.

While the large air powers would, of course, insist on maintaining their own national airlines on a traditional basis, smaller countries may find that banding together to form international operating companies is the most efficient and feasible way to participate in international aviation. One example of this approach is Air Afrique, a company created by treaty among eleven African nations to operate a single airline.¹⁵⁸ At the present time, the world is witnessing the emergence of a variety of multi-national cooperative efforts which seek to bring together capital and technology in innovative structures to achieve productive purposes. The enterprises that produced the Concorde and the European Airbus are examples of such an approach. It may well be that the operation of international civil aviation will also witness this phenomenon or at least greater cooperation among international carriers in the years ahead. The challenge of international air law will be to find the rules and the structures to facilitate that cooperation and to enable all of mankind, in large nations and in small, to benefit from international aviation. In this process, the technologically advanced countries which have led in taming the airways and space may be tempted to assert proprietary rights because after all "they thought of it first"; however, it is also well to remember

¹⁵⁸ Treaty on Air Transport in Africa, *done*, Mar. 28, 1961, ICAO Circular 98—AT/19, at 9, 27-28 (Nov. 1970).

what the Little Prince learned from a fox during his travels: “ ‘Men have forgotten this truth,’ ” said the fox. “ ‘But you must not forget it. You become responsible, forever, for what you have tamed.’ ”¹⁵⁹

¹⁵⁹ A. DE SAINT EXUPERY, *THE LITTLE PRINCE* 72 (K. Woods trans. 1943).